

# The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force

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The United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted in 2005 the first legally binding international instrument on culture. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>1</sup> was agreed upon with an overwhelming majority of 148 states, with only the United States and Israel voting against it.<sup>2</sup> After the swiftest ratification process in the history of UNESCO, the convention entered into force on 18 March 2007, and more than 120 countries have now ratified it.<sup>3</sup> This incredible success in international law making, and on an issue as controversial as culture, makes not only observers with a particular interest in the topic but also the broader public eager to know what has happened five years since the convention's entry into force—now that the rhetorical elation of the early days has settled and the ratifying members should have moved on with the implementation. This is the question that animates this article and that it seeks to answer by giving a brief background to the UNESCO Convention, clarifying its legal and political status and impact, and looking at the current progress made in its implementation.

## 1. PUTTING THE UNESCO CONVENTION ON CULTURAL DIVERSITY INTO CONTEXT

The UNESCO Convention on Cultural Diversity can be seen as the culmination of some previous, mostly exhortatory acts<sup>4</sup> in the fields of culture and trade,<sup>5</sup> and of cultural heritage.<sup>6</sup> More broadly and also more pertinently, the convention should be perceived as a reaction to the process of economic globalization and in particular to the emergence of enforceable multilateral trade rules through the World Trade Organization (WTO). The UNESCO Convention was intended to provide a counterbalance to this high level of institutionalization of economic regulation and

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1 to cater to noneconomic objectives that states might wish to pursue, in particular  
2 in the field of culture.<sup>7</sup>

3 The actual text of the convention hardly lives up to this ambitious goal. The  
4 convention's drawbacks can be grouped into three categories, relating to (1) the  
5 lack of binding obligations, (2) its substantive incompleteness, and (3) its ambiguous  
6 relation towards other international instruments.

7 (1) Although the UNESCO Convention was meant to be a legally binding  
8 instrument, in fact, it has precious few obligations, and these are formulated as  
9 mere stimuli for the parties to adopt measures protecting cultural diversity at the  
10 national<sup>8</sup> and international<sup>9</sup> levels. There are only two provisions that can be said  
11 to be of a binding nature. The first resembles the WTO's enabling clause<sup>10</sup> and  
12 relates to the preferential treatment that developed countries must grant to  
13 cultural workers and cultural goods of developing countries.<sup>11</sup> The second, formu-  
14 lated in Article 17, creates an obligation for international cooperation in situations  
15 of serious threat to cultural expressions, construed in particular as assistance from  
16 developed to developing countries. Even this pair of "real" obligations is vague and  
17 unlikely to bring about radical change; they also appear somewhat marginal to the  
18 proclaimed goal of cultural diversity.

19 Despite the limited obligations on the parties to take action to protect and  
20 promote cultural diversity, the UNESCO Convention formulates an extensive  
21 block of rights to that end. Article 6(2) provides a nonexhaustive list of measures  
22 that the parties may adopt.<sup>12</sup> The list is virtually all encompassing, ranging from  
23 the generic "regulatory measures aimed at protecting and promoting diversity of  
24 cultural expressions"<sup>13</sup> to the concrete example of public service broadcasting.<sup>14</sup>  
25 This all-inclusive approach, adding up to the UNESCO Convention's broad and  
26 fuzzy definition of "cultural diversity"<sup>15</sup> and the lack of proportionality or effi-  
27 ciency tests, opens the door to state activism in a wide range of economic sectors  
28 that affect culture in one way or another. This situation has been criticized both by  
29 prominent negotiating parties, notably the United States,<sup>16</sup> and a host of scholars,<sup>17</sup>  
30 who warn against protectionism and the potential harm to the free flow of infor-  
31 mation. The value added by the convention's Operational Guidelines in assisting  
32 efforts to concretize targeted action and ensure balanced choices can be deemed  
33 minimal.<sup>18</sup> The guidelines have remained very general; despite some useful clar-  
34 ifications, they are framed as recommendations and are ultimately unlikely to  
35 strongly influence the actual implementation by the ratifying members.

36 (2) As well as the missing obligations and implementation criteria, one should  
37 note that the framework of the UNESCO Convention is not comprehensive enough  
38 to secure the protection and promotion of cultural diversity, as it leaves some crit-  
39 ical elements outside its otherwise generously defined scope of application. Some  
40 of these missing pieces are related to the centrality of state sovereignty, which is  
41 intrinsic to the UNESCO Convention, as all rights and obligations stemming from  
42 the convention are attributed to states.<sup>19</sup> While this is understandable for an inter-  
43 governmental treaty, cultural rights do not correspond to national boundaries.<sup>20</sup>

1 Quite the contrary, it needs to be acknowledged that many of the processes of cul-  
2 tural homogenization have occurred precisely because of state-led policies aimed  
3 at cultural standardization and an overlap between state and culture, whereby the  
4 goal has frequently been to impose the culture of dominant elites on the rest of the  
5 citizenry.<sup>21</sup>

6 The fact that the UNESCO Convention subscribes to respecting and safeguard-  
7 ing human rights and fundamental freedoms<sup>22</sup> may partly remedy this situation.  
8 Still, it is somewhat disappointing that specific cultural rights—such as access to  
9 education or use of language of choice—did not make it into the text,<sup>23</sup> in par-  
10 ticular since they were acknowledged by the earlier but nonbinding UNESCO  
11 Declaration on Cultural Diversity.<sup>24</sup> Neither are the specific rights of indigenous  
12 peoples<sup>25</sup> nor those of media organizations, journalists, or individuals appropri-  
13 ately safeguarded.

14 A vital element omitted from the regulatory domain of the UNESCO Conven-  
15 tion, except for the brief remark in the preamble,<sup>26</sup> is intellectual property rights  
16 (IPRs). This omission is odd, since IPRs have as their core objective the protection  
17 and promotion of creativity and innovation, and are thus an indispensable element  
18 of all processes related to the creation of, distribution of, and access to cultural  
19 content.<sup>27</sup>

20 (3) A significant drawback of the convention in terms of the critical role it was  
21 supposed to play as a counterforce to economic globalization (as epitomized by  
22 the WTO) is its “conflict of laws” provision.<sup>28</sup> This crucial norm, as provided by  
23 Article 20 of the UNESCO Convention, fails to ensure any meaningful interface  
24 with the rules of the WTO (or any of the other existing international agreements)  
25 in case of a conflict between them.<sup>29</sup> Article 20 provides simultaneously that  
26 “[n]othing in this Convention shall be interpreted as modifying rights and obligations  
27 of the Parties under any other treaties to which they are parties,”<sup>30</sup> and that “with-  
28 out subordinating this Convention to any other treaty,” Parties shall foster mutual  
29 supportiveness between the convention and the other treaties to which they are  
30 parties.<sup>31</sup> Even without lengthy deliberations on the possible implementation and  
31 interpretation scenarios,<sup>32</sup> it is evident that this rather paradoxical formulation  
32 involves no modification of rights and obligations of the parties under other exist-  
33 ing treaties.<sup>33</sup> For some of them, such as notably the harmonized enforceable IPRs  
34 under the WTO Agreement on Trade-Related Aspects of Intellectual Property  
35 Rights (TRIPs), any modification appears outright impossible.

36 To sum up the critique of the UNESCO Convention’s text, one can maintain  
37 that it is an instrument of soft rather than hard law,<sup>34</sup> which largely evades contro-  
38 versies and while affirming state sovereignty in cultural policy matters, fails to pro-  
39 vide adequate guidance on how to design appropriate, future-oriented instruments  
40 capable of protecting and promoting cultural diversity in a world of profound rule  
41 fragmentation and complexity and of rapid technological change.<sup>35</sup> Alternatively,  
42 one might venture to suggest that what made the adoption of the UNESCO  
43 Convention possible emptied it of some of its stronger and more valuable content.

This is proof of the complexity of the issues that arise whenever cultural diversity is to be addressed. The convention's less than bold text is also the result of the starkly different sensibilities and motivation of the parties when drafting an international instrument on cultural matters.<sup>36</sup> In practical terms, the role of the United States in diluting the substance of the UNESCO Convention by ingeniously making it broader, fuzzier, and less binding has also to be acknowledged.

## 2. THE IMPACT OF THE UNESCO CONVENTION

Thinking beyond the convention's textual basis, it is important to ask what its impact is. This question must be addressed through careful consideration of the record of implementation activities so far, but also more crucially, against the backdrop of the international regime complexity,<sup>37</sup> to which the UNESCO Convention was a reaction and in which it is now embedded. It is important to note in the latter context that although the negotiation processes, which led to an agreement, are certainly critical for the agreement's clout, "political deals often get redefined during implementation because the actors who implement agreements have different priorities and are subject to different pressures than are the policymakers who designed the deal in the first place."<sup>38</sup> This could be particularly true for the UNESCO Convention on Cultural Diversity, as international regime complexity has in effect reduced the clarity of its legal obligations and introduced overlapping sets of rules that govern, among others, issues of culture and trade, culture and intellectual property, or culture and human rights, as already observed in the preceding section. We find the theoretical framework of international regime complexity, which examines the existing multiple, overlapping, and nonhierarchical regimes, as particularly fitting to capture the many facets and directions of the UNESCO Convention's effects. This framework would suggest that "where state preferences are similar, lawyers overcome fragmentation by crafting agreements that resolve conflicts across regimes, and thus legal ambiguity is transitory. Where preferences diverge, states block attempts to clarify the rules, and thus ambiguity persists, allowing countries to select their preferred rule or interpretation."<sup>39</sup>

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In the following, we test whether the latter conjecture has been proven in the past five years. We also look at the effect the UNESCO Convention on Cultural Diversity has had on other regimes, notably the international trade regime, as it is here that the major impact was intended at the time that the cultural proponents changed the venue from the WTO to UNESCO.<sup>40</sup> We also look at some concrete implementation initiatives under the auspices of the convention itself and in its ratifying members, and try to assess them in context.

### 2.1. *The UNESCO Convention's Impact Vis-à-Vis the WTO*

Despite the impressive number of states that have ratified the convention, and thus have arguably committed themselves to the objective of protecting and promoting

1 cultural diversity, the impact of the UNESCO Convention on the WTO regime  
2 is to be judged as minimal. What is observable above all is an affirmation of the  
3 status quo,<sup>41</sup> which has been characterized by the legacy line of separation between  
4 the European Union (EU) and the United States with their respective proculture  
5 and protrade positions, if we are to describe them in a typified manner,<sup>42</sup> and the  
6 existence of diverse smaller clusters of countries with less strongly voiced opinions.

7 The success of the adoption of the UNESCO Convention cannot mask the  
8 political economy behind it and the fact that different states have ratified it for  
9 very different reasons.<sup>43</sup> Although the Canadian and French delegations,<sup>44</sup> assisted  
10 by a number of NGOs, were fairly efficient during the convention's negotiation,<sup>45</sup>  
11 this mobilization is not strong enough to go beyond the weak regulatory charge of  
12 the UNESCO Convention and to matter when "real" trade interests are at stake.  
13 At present, it is highly unlikely that a negotiating bloc will form within the WTO  
14 to push for more culture-oriented solutions—such as including some sort of  
15 "cultural exception,"<sup>46</sup> an express clause for culture in the general exception pro-  
16 visions of the General Agreement on Tariffs and Trade (GATT) (Article XX) and  
17 the General Agreement on Trade in Services (GATS) (Article XIV), or including  
18 cultural diversity as one of the objectives of the WTO in the Preamble of the WTO  
19 Agreement.<sup>47</sup> This is evident from the current state of trade talks, as launched  
20 under the Doha Development Agenda in 2001.<sup>48</sup>

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21 Although Doha has not stalled because of the trade-versus-culture debate,  
22 the requests and offers tabled so far reveal precious few new commitments and  
23 no future-oriented rules design that could address cultural matters at their inter-  
24 section with economic interests. This is particularly palpable in the audiovisual  
25 services sector, which has been the most contentious in this clash and is likely to  
26 remain the service sector with the fewest commitments even after a successful  
27 completion of the Doha round.<sup>49</sup> Despite the recognition widely shared by key  
28 WTO members that the audiovisual sector has changed dramatically,<sup>50</sup> in particular  
29 in the face of the convergence of the information technology, telecommunications,  
30 and media sectors, and due to the sweeping transformations caused by the Inter-  
31 net, there is little agreement on the way forward. The trade-versus-culture status  
32 quo has indeed been perpetuated through the UNESCO Convention. This has had  
33 multiple (primarily negative) effects for the WTO outside the narrow domain of  
34 audiovisual services. The spillover effects are felt in the discussions on advancing  
35 liberalization and coherent global regulation in the "neighboring" areas of tele-  
36 communications and electronic commerce.<sup>51</sup> Overall, the WTO, in many senses,  
37 is rendered unable to appropriately address trade in the Internet age,<sup>52</sup> despite the  
38 organization's inherent flexibility and potential to adapt.<sup>53</sup>

39 Against the backdrop of this political deadlock, many observers had been hoping  
40 that when a new trade-versus-culture case emerged, the WTO adjudication—a  
41 uniquely powerful mechanism of dispute resolution at the international level<sup>54</sup>—  
42 would provide a final resolution to the conflict, while possibly also clarifying the  
43 status of the UNESCO Convention and its relationship with the WTO rules.<sup>55</sup>



1 The *China–Publications and Audiovisual Products* case,<sup>56</sup> decided in favor of the AQ6  
 2 United States in 2009, proved the contrary. In this particular case, China tried to  
 3 justify diverse measures in the media domain by invoking the UNESCO Conven-  
 4 tion and the related UNESCO Declaration on Cultural Diversity.<sup>57</sup> The panel was  
 5 not sympathetic to this attempt and recalled that “the UNESCO Convention  
 6 expressly provides: ‘Nothing in this Convention shall be interpreted as modifying  
 7 the rights and obligations of the parties under any other treaties to which they  
 8 are parties.’”<sup>58</sup> The panel went on to say that “[i]n any event, nothing in the text  
 9 of the WTO Agreement provides an exception from WTO disciplines in terms  
 10 of ‘cultural goods,’ and China’s Accession Protocol likewise contains no such  
 11 exception.”<sup>59</sup> Thus, China’s attempt to apply the UNESCO Convention as a shield  
 12 remained futile—a position that was also supported by the Appellate Body, despite  
 13 China’s request to the Appellate Body to be “mindful”<sup>60</sup> of the specific dual nature  
 14 of cultural goods and services.

15 Interestingly, the panel did leave the door open for further consideration of  
 16 cultural concerns, as it interpreted broadly Article XX(a) GATT, which justifies  
 17 measures violating rules of the WTO Agreements when these measures serve the  
 18 protection of public morals.<sup>61</sup> It acknowledged China’s claim that “reading materials  
 19 and finished audiovisual products are so-called ‘cultural goods’” and these are  
 20 “of a unique kind with a potentially serious negative impact on public morals.”<sup>62</sup>  
 21 Despite the fact that the panel found the measures at issue not “necessary within the  
 22 meaning of Article XX(a),”<sup>63</sup> this may be interpreted as newly enhanced flexibility  
 23 of the WTO rules with regard to culture, which can be used in the future.  
 24

## 25 2.2. *The UNESCO Convention’s Impact Outside the WTO*

26  
 27 The standstill in the WTO in trade and culture matters, which has only been  
 28 confirmed by the UNESCO Convention, has had repercussions outside the WTO.  
 29 The example with digital trade and the inability of the WTO to tackle the relevant  
 30 questions because of the issue overlaps with culture is illuminating. It is symptom-  
 31 atic of the overall intensified power plays, which led to increased fragmentation of AQ7  
 32 both negotiation themes and of negotiation fora. The lack of solutions within the  
 33 WTO context has driven and will continue to drive members to take the bilateral  
 34 or regional paths to advance their policy priorities. The United States in particular has  
 35 made substantial efforts to ensure implementation of its digital agenda<sup>64</sup> through a  
 36 number of free trade agreements (FTAs). The agreements reached since 2002 with  
 37 Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American  
 38 countries,<sup>65</sup> and most recently with Panama, Colombia, and South Korea, contain  
 39 only minimal restrictions on digital products, applying a negative scheduling  
 40 approach (in contrast to the standard GATS positive pick-and-choose mode) and  
 41 also tackle some “deep” e-commerce regulatory issues.<sup>66</sup>

42 Interestingly in this exercise, the United States has shown some deference to the  
 43 culturally inspired measures of its FTA partners in the field of audiovisual services

1 and permitted the policy space needed for these measures. The measures are,  
2 however, frozen at their present level.<sup>67</sup> Moreover, they could only relate to  
3 conventional offline technologies. It is also noteworthy that the leeway given to the  
4 U.S. partners with respect to trade in cultural products tends to reflect the negoti-  
5 ating capacity of the states involved—the smaller the country, the more concessions  
6 it makes.<sup>68</sup> Policy room thus may often be substantially reduced, and countries  
7 (especially the poorer ones) may not be able to appropriately cater for diverse public  
8 interests in the field of media—particularly digital media—in effect constraining  
9 the possibilities for implementing the UNESCO Convention in the said domains.

10 Before looking at the implementation activities of the convention's parties, we  
11 can sum up at this stage by saying that the UNESCO Convention has had a certain  
12 impact on the international regime complex. In the specific case of starkly diverging  
13 positions of the EU and the United States on the matters of trade and culture,  
14 the theoretical conjecture that ambiguity would persist has by and large been  
15 confirmed. Further, it appears that the deadlock in the WTO realm with regard to  
16 cultural products and services may have led to overall greater uncertainty and  
17 unpredictability regarding the WTO trade liberalization commitments and the  
18 ways forward, both in terms of future commitments and rules design. As Shaffer  
19 and Pollack contend, and as the *China–Audiovisual* case mentioned earlier proves,  
20 this may be related to a process of “softening” the hard law of the WTO.<sup>69</sup>  
21 Importantly, as the distributive conflict between the United States and the EU  
22 continues, the UNESCO and the WTO regimes are highly unlikely to “converge  
23 into a new synthesis, but rather will remain in conflict for a prolonged period.”<sup>70</sup>

24 The impact of the convention on UNESCO (its own parent organization) and  
25 UNESCO's authority can be deemed sizeable, as it has subsequently become a hub  
26 of new activities. The UNESCO Convention has also effectively contributed to  
27 promoting the notion of cultural diversity and establishing it as a global public  
28 good, that is, as a regulatory objective worth pursuing in a wide range of activities  
29 and venues, both domestically and internationally. To be sure, the convention has  
30 mobilized international cooperation, although the overall impact of the activities it  
31 has triggered may be small in practical terms, as we discuss in the next section, and  
32 the question of whether this development can be sustained remains open.

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### 34 3. IMPLEMENTATION INITIATIVES

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36 While looking at the UNESCO Convention's text, we have already alluded to its  
37 low legal charge and the many ambiguities (in definitions, actions, and regime  
38 interfaces, among others) it contains. It should be added that this state of normative  
39 incompleteness is exacerbated by the lack of institutional or adjudicatory mech-  
40 anisms that could procedurally clarify and complete the contract over time. The  
41 convention's own dispute settlement is not compulsory. Negotiation, good offices,  
42 and mediation are the preferred modes of settling a disagreement. The possibility  
43 for a conciliation procedure exists, but the parties must only consider in good

1 faith the proposal made by the Conciliation Commission, and a party may at any  
 2 time declare that it does not recognize the conciliation procedure as a method  
 3 of dispute resolution.<sup>71</sup> The Intergovernmental Committee, which comprises  
 4 24 members elected on the principles of equitable geographical representation and  
 5 rotation and which serves as the executive body of the convention, is also insuffi-  
 6 ciently empowered. The Intergovernmental Committee's competencies, as defined  
 7 in Article 23(6), do not provide a solid legal basis to enable it to engage in inter-  
 8 pretation of the convention beyond preparing the operational guidelines (which  
 9 have, however, to be approved by all the members) and commenting on the state  
 10 reports (which are, however, prepared by the states themselves).<sup>72</sup> It should also be  
 11 stressed that the UNESCO Convention provides for no sanctions or other strong  
 12 control mechanisms—failure to fulfill any of the obligations could at worst result  
 13 in a state being criticized by the Intergovernmental Committee and the Conference  
 14 of Parties on the basis of its own report.<sup>73</sup> This may carry some reputational costs,<sup>74</sup>  
 15 but is not comparable to the hard and enforceable sanctions of the WTO dispute  
 16 settlement.

17 To be sure, this operational deficiency compounds the relative weakness of the  
 18 convention's text and substantially lowers the expectations in terms of imple-  
 19 mentation activities. It should also be stressed that since the UNESCO Conven-  
 20 tion was initially conceived as a counterreaction to the harder rules of the WTO  
 21 Agreements and more generally to the deep processes of economic globalization,  
 22 its main implementation thrust has always been perceived to be in external affairs  
 23 rather than in a state's own domestic cultural policy.<sup>75</sup> An analysis of the UNESCO  
 24 Convention and its implications in the Arab world, for instance, revealed that the  
 25 Arab states almost completely disregard its domestic dimension:

26           While Arab governments have adopted the Convention, they have a  
 27           tendency to regard it more as a means through which they can gain  
 28           recognition in the global arena rather than as a guiding document for  
 29           internal policy-making, particularly because they are conscious that  
 30           opening the door to cultural pluralism will naturally lead to a political  
 31           pluralism that they would much rather delay.<sup>76</sup>

32 Considering the diversity of states that have ratified the convention, many of which  
 33 have bad democratic and human rights records, this statement is possibly valid for  
 34 other regions too. It is hard to imagine that countries like China, Syria, Afghani-  
 35 stan, Rwanda, or Saudi Arabia will all of a sudden subscribe to a higher standard  
 36 in protecting cultural rights and promoting diversity. In addition, many of the  
 37 members fall into the least developed or very poor developing countries category  
 38 (e.g., Nigeria, Zimbabwe, Malawi, and Haiti), and simply lack the finances to take  
 39 any action.

40 This said, we can nonetheless expect some progress in implementation,  
 41 especially by those states that have been at the forefront of the culture versus trade  
 42 battle from the very outset and that have fervently worked towards the conven-  
 43 tion's adoption and ratification. The EU and its Member States are in this sense



1 the obvious front-runners. We thus concentrate in the following above all on the  
2 implementation record of the EU, using not only the data provided in the  
3 context of the UNESCO Convention but also additional data and more in-depth  
4 analysis available on the EU's cultural policy at home and abroad. Where relevant,  
5 we take up instances from other countries, using the data made available in their  
6 quadrennial periodic reports, as required by the UNESCO Convention and  
7 submitted by 48 parties in 2012, some 25 of which are non-EU and 21 non-European  
8 countries.<sup>77</sup>

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### 10 *3.1. In External Affairs*

11  
12 As the recently submitted country reports reveal, there have been a number of  
13 activities on the international scene related to the UNESCO Convention's imple-  
14 mentation. The major thrust is on international cooperation. Worth noting is  
15 that the focus of international cultural cooperation activities by the parties has  
16 expanded geographically over the past 20 years (with a new focus on Brazil, China,  
17 and India). Even more importantly, there has been a shift from "purely 'promotional'  
18 activities (showcasing the cultural heritage of one country in another) to those that  
19 facilitate cooperation in specific cultural industry sectors as well as on concrete  
20 cultural policy themes or related projects."<sup>78</sup> Culture has become one of the  
21 underlying objectives in international frameworks, strategies, and programs  
22 of several parties, in particular in the specific context of cultural cooperation for  
23 development (as provided for in Article 14 UNESCO Convention).<sup>79</sup> This includes  
24 not only capacity building, training, and technology transfer but also newer forms  
25 of bilateral and multilateral cooperation that aim to support cultural and creative  
26 industries in developing countries, which facilitate the flow of cultural goods and  
27 services and the mobility of artists and creators worldwide.<sup>80</sup>

28 While the number and the diversity of these activities may be impressive, it  
29 should be said that many of them are smaller-scale projects without sizeable budgets  
30 and may often be of limited duration.<sup>81</sup> Even the convention's own International  
31 Fund for Cultural Diversity (IFCD), established under Article 18, is not well  
32 enough endowed to support larger initiatives, as its resources consist of voluntary  
33 contributions made by the parties and gifts from other countries, organizations,  
34 and individuals.<sup>82</sup> If we contemplate the convention's impact in the longer run, it  
35 may be that this aid is found to be insufficient by developing countries, especially  
36 those who were not strong cultural proponents to begin with; these countries may  
37 choose the benefits from trade and seek real market access concessions. Such an  
38 aspiration would not be utterly misplaced, as "even a cursory look at international  
39 trade in cultural products shows" that, "developed countries at the forefront of  
40 efforts to 'protect' cultural diversity are at the forefront of cultural trade as well."<sup>83</sup>

41 Still, these activities endorsed under the auspices of the UNESCO Convention  
42 should not be underestimated. They significantly raise the awareness of cultural  
43 diversity as a policy objective, as well as the awareness of cultural diversity policies,

1 and move towards establishing best practices.<sup>84</sup> They mobilize an expanding  
 2 network of actors at all levels of government, including many NGOs—some  
 3 already existing (such as the network of European Union National Institutes for  
 4 Culture<sup>85</sup>), others specifically founded for the purpose (such as the Global Alliance  
 5 for Cultural Diversity<sup>86</sup>)—as well as actors from the cultural industries. None of  
 6 the initiatives so far, however, amounts to a legal or policy reform; neither does any  
 7 initiative expressly seek an interface with the trade regime.

8 One model that stands out for its innovative design and possibly farther-reaching  
 9 effects is that of the Protocols on Cultural Cooperation, negotiated by the European  
 10 Commission on behalf of the EU and its Member States. The protocols are, on  
 11 the one hand, a direct implementation effort of the UNESCO Convention; on the  
 12 other hand, they are responses to broader changes in the EU's external policies.  
 13 These changes relate to the extended competencies of the EU in matters of common  
 14 commercial policy after the Lisbon Treaty,<sup>87</sup> as well as more specifically to the EU's  
 15 repositioning with regard to new regional or bilateral agreements having an  
 16 economic integration dimension.<sup>88</sup> This latter foresees notably that audiovisual  
 17 services (including the content-related implications of electronic commerce)  
 18 should be excluded from the scope of such trade agreements, and that audiovisual  
 19 and other cultural services should receive special treatment under dedicated  
 20 cooperation frameworks.<sup>89</sup>

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21 The first Protocol on Cultural Cooperation was signed in the context of the  
 22 Economic Partnership Agreement with the Caribbean Forum of African, Caribbean  
 23 and Pacific States (CARIFORUM)<sup>90</sup> in 2008, its negotiation having started before  
 24 the UNESCO Convention was ratified by the EU and before its entry into force.  
 25 The second effort, which has been slightly calibrated,<sup>91</sup> was the Protocol with South  
 26 Korea. The most recent examples relate to the EU trade agreement with Colombia  
 27 and Peru and the EU–Central America Association Agreement, both initiated in  
 28 2011, and both of which include cultural cooperation provisions.<sup>92</sup>

29 The protocols are not uniform but rather are tailored to the specific circumstances  
 30 of the partner.<sup>93</sup> Typical of all, however, is the attempt to interface trade and culture,  
 31 and this is no trivial matter: “The inclusion of language on cultural coopera-  
 32 tion matters marks a significant evolution in EU attitudes towards the subject  
 33 matter in a trade policy context, hitherto marked by a desire to preserve max-  
 34 imum policy autonomy by eschewing any commitments in trade agreements  
 35 and, in the case of the DDA [Doha Development Agenda], by refusing to direct  
 36 negotiating requests to its trading partners and to entertain offers in response  
 37 to trading partner requests in cultural industries.”<sup>94</sup> Although the EU does  
 38 not expressly grant new market commitments, in many senses the protocols  
 39 improve access to the EU market, especially with regard to the temporary entry  
 40 of natural persons and the treatment of cultural industries.<sup>95</sup> In effect, such  
 41 provisions allow preferential treatment under the exception of Article V GATS  
 42 for economic integration, and thus again have an impact on global trade and  
 43 global trade regulation.<sup>96</sup>

Far-reaching has also been the commitment inscribed in the EU-CARIFORUM and the EU–Korea Protocols, whereby coproductions qualify as “European works” in the sense of the EU Audiovisual Media Services Directive (AVMSD),<sup>97</sup> and thus can benefit from various quota and other support schemes made available in the EU, in particular from the majority broadcasting quota.<sup>98</sup> This obligation is reciprocal, and European producers can enjoy the same treatment in the partner country.<sup>99</sup>

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The Protocols on Cultural Cooperation have been subject to some criticism, in particular by France and the European Coalitions for Cultural Diversity. Among other things,<sup>100</sup> they have argued that the European Commission is stretching its competences by incorporating culture into trade negotiations through the back door, while cultural affairs still primarily fall into the policy domain of the Member States. They also fear that the trade and culture linkage goes against the spirit of the UNESCO Convention and may in fact harm cultural diversity.<sup>101</sup>

Regardless of whether this critique is unfounded (and it probably is),<sup>102</sup> the EU has softened its approach in the last two cultural cooperation agreements, as they are not directly tied to the trade agreement, which has been negotiated in parallel, and do not include the controversial coproduction recognition as domestic works, which offers a deeper market access and a sizeable package of benefits, otherwise available only to audiovisual works made with European money.<sup>103</sup>

### 3.2. *At Home*

As we noted earlier, the UNESCO Convention is fairly vague on what exactly is to be done to secure its appropriate implementation. The convention’s reporting framework was slightly more specific in showing what is expected, at least for the purposes of reporting. It requested information on the measures that the parties have put in place to promote the diversity of cultural expressions at the different stages of creation, production, distribution, dissemination, and participation. As such, these measures were meant to be understood as those that nurture creativity and form part of an enabling environment for independent producers and distributors working in the cultural industries, as well as measures that provide access for the public at large to diverse cultural expressions.<sup>104</sup> Actions that fall under these categories and have been undertaken by the parties include direct financial support to artists (majority of reporting parties); legislation on the status of the artist (e.g., Austria, Canada, Germany, Lithuania, Namibia, Mongolia, Montenegro, Norway, and Peru); incubator schemes for young artists and female artists (e.g., Austria); support for artists’ mobility, particularly in a regional or subregional context (e.g., Bolivia, Chile, Cyprus, and the EU); establishing artists’ residencies (Argentina and Tunisia), as well as support for the better use of copyright mechanisms (e.g., Denmark, Greece, Namibia, Oman, Slovenia, and the EU).<sup>105</sup> In addition, there have been a number of training and education programs<sup>106</sup> and a great variety of initiatives that can be considered as forming part of an enabling environment for the production and distribution of cultural goods and services. On the production

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side, they encompass direct funding for the production of domestic cultural content (majority of reporting parties); support for the creation and functioning of production infrastructures and entities such as cultural industry companies or networks (e.g., Argentina, Brazil, Bulgaria, Canada, Ecuador, Estonia, France, Germany, Monaco, Paraguay, and the EU); workshops on production competencies and individual entrepreneurial skills (e.g., Argentina, Brazil, and Peru); schemes that collect levies on the revenues of public and private cultural industries to reinvest into national productions (e.g., Poland); and coproduction schemes (e.g., the EU and its Member States). Frequently reported distribution measures were local or national schemes to build up distributional and marketing capacities in cultural production (e.g., Austria, Brazil, Cyprus, Ecuador, Estonia, Mongolia, Nigeria, Slovakia, Tunisia, and the EU); development of local distribution mechanisms including the creation of physical infrastructure (e.g., Montenegro); content quotas (e.g., Canada, France, and Portugal); measures to promote the export of cultural goods and services (e.g., Austria, Argentina, Canada, Estonia, Finland, Oman, and Tunisia); media policies, including the promotion of public service media and of diversity therein (e.g., Austria, Argentina, Denmark, France, Montenegro, Norway, Peru, Slovakia, Slovenia, Sweden, Switzerland, and Uruguay); and support for promotional events such as “markets,” “fairs,” “festivals,” or “years” (e.g., Argentina, Ecuador, Estonia, Greece, Montenegro, and Peru).<sup>107</sup>

A number of the reported cultural measures focus on the audience side and are intended to ensure the public’s participation in cultural life as a means to enhance the overall quality of life. Such interventions have been made with a view to promoting cultural and media literacy (majority of reporting parties); promoting the access and participation of minorities, indigenous peoples, young people, and women in cultural life (majority of reporting parties); promoting access and participation of the socially disadvantaged, the disabled and the elderly (e.g., Norway, Portugal, and Spain); and lowering price barriers to access to cultural goods through diverse measures, such as reduced taxes (e.g., the EU Member States).<sup>108</sup>

Overall until now, it appears that the bulk of the action has been on fostering the distribution and enjoyment of cultural goods and services; the policy objectives of creation and production are common but less prevalent.<sup>109</sup> Importantly, institutional policies were the most common type of policies and measures adopted by the reporting convention’s parties. Almost all parties have established national institutes to promote the cultural industries or a particular industry, created departments or institutes of the Ministry of Culture to promote cultural expressions of persons belonging to minorities, or, in some cases, established a Ministry of Culture.<sup>110</sup>

In all these activities, a key question that can be raised when attempting to assess the impact of the UNESCO Convention, as well as the progress made in its implementation, is that of the *causal link* between the convention and the manifold interventions in the field of cultural policy, some of which clearly predate the convention’s entry into force. With regard to the EU, which we somewhat singled out as a reference point in our analysis, this question is particularly pertinent.

AQ13 1 Despite the EU's limited competence in matters of culture,<sup>111</sup> it has a consider- AQ14  
 2 able number of actions in place in the field of culture, encompassing internal policy  
 3 measures in the domains of (1) culture, education and youth; (2) communication;  
 4 (3) regional policy; (4) agriculture and sustainable development; (5) employment,  
 5 social affairs, and equal opportunities; (6) the audiovisual sector; (7) information  
 6 society and research; (8) competition policy; (9) internal market; and (10) mari-  
 7 time policy.<sup>112</sup> In addition, pursuant to Article 167 Treaty on the Functioning of  
 8 the European Union (TFEU) (formerly Article 154 EC), the EU has committed to  
 9 continued efforts to mainstream culture in all its activities.<sup>113</sup> This certainly reflects  
 10 the spirit and the letter of the UNESCO Convention on Cultural Diversity. On  
 11 the other hand, despite the fact that the EU has this advanced package of internal  
 12 policies related to culture, it has not taken any decisive *new* action for the protec-  
 13 tion and promotion of cultural diversity. We have argued elsewhere<sup>114</sup> that in  
 14 particular in the field of digital media, its current instruments are outdated.<sup>115</sup> In  
 15 its report to the UNESCO Convention's Intergovernmental Committee, the EU  
 16 and its Member States did admit that there is "a certain difficulty in distinguishing  
 17 the achievements specifically linked to the implementation of the Convention  
 18 from those related to their existing cultural policies."<sup>116</sup>

19 Overall, it appears that for the parties, which already had the necessary structures  
 20 and policies in place, the convention's implementation has meant supplementing  
 21 existing policies rather than making a major policy shift.<sup>117</sup> It has been argued that  
 22 the UNESCO Convention has nonetheless introduced "a new perspective and  
 23 reference framework to cultural policy debates."<sup>118</sup> For parties with less developed  
 24 structures, the convention has more tangibly spurred the active development of  
 25 cultural policies and the strengthening of their cultural industries.<sup>119</sup>

#### 26 27 4. CONCLUDING REMARKS

28  
29 As Kal Raustiala and others maintain, we must distinguish between the compliance  
 30 with a certain legal instrument and its effectiveness.<sup>120</sup> Raustiala argues that

31 compliance as a concept draws no causal linkage between a legal rule and  
 32 behavior, but simply identifies a conformity between the rule and behavior.  
 33 To speak of effectiveness is to speak directly of causality: to claim that a  
 34 rule is 'effective' is to claim that it led to certain behaviors or outcomes,  
 35 which may or may not meet the legal standard of compliance.<sup>121</sup>

36 In this sense, we can contend that the UNESCO Convention has been complied  
 37 with, and there are a host of activities in both domestic and international contexts  
 38 that can offer proof of its advancing implementation. We are, however, less certain  
 39 of the effectiveness of the UNESCO Convention in protecting and promoting the  
 40 diversity of cultural expressions. We observed that the influence of the convention  
 41 on the international regime complex where it is situated has been minimal, and  
 42 no working interface between the trade and the cultural regimes has emerged;  
 43 indeed, the venue shopping from the WTO to UNESCO on the occasion of the



1 convention's adoption may have exacerbated the conflict and perpetuated the  
 2 "cultural exception" status quo. While international cooperation has been spurred  
 3 under the auspices of the UNESCO Convention, in particular in the field of coop-  
 4 eration for development, the implications of this for the overall regime complex  
 5 may also be marginal, as cooperation pledges are not far-reaching and/or are  
 6 insufficiently funded. The EU experiment with the Protocols on Cultural Cooper-  
 7 ation can be seen as an innovative step, but it has been controversial especially with  
 8 regard to linking cultural and trade activities and agreements. Bearing in mind that  
 9 the intended focus of the UNESCO Convention has always been on external affairs,  
 10 the status of implementation domestically disappoints less. It is hard to draw  
 11 the line between those instruments and interventions that have been specifically  
 12 designed to address the convention's (admittedly vague) objectives and the "business  
 13 as usual" in national cultural policies. Positive achievements should be seen in the  
 AQ15 14 development of best practices, the building of statistical resources, and the impact  
 15 assessments of the tools applied, which may in the longer run improve the efficiency of  
 16 the measures and dispel some of the protectionist fears the convention has instilled.

17 To conclude, it is perhaps too early to judge the impact of the UNESCO Conven-  
 18 tion as only five years have passed since its entry into force. First, it does take time  
 19 for those newly installed agencies, networks, and institutes to work. Second, it has  
 20 been argued that a full implementation of the convention should not focus exclu-  
 21 sively on technical and financial aspects, such as capacity building, coproduction,  
 22 or project funding but "embrace its political dimension as well, including strength-  
 23 ening civil society, access to the media, the place of independent creativity in the  
 24 public realm."<sup>122</sup> Areas such as the integration of culture in sustainable develop-  
 25 ment or in preferential treatment also arguably call for longer-term adjustments.<sup>123</sup>  
 26 The same may be true for the evolution of international regime complexity. "As  
 27 the number of countries ratifying the Convention grows, the Convention, together  
 28 with the 2001 UNESCO Universal Declaration, could be viewed as emerging  
 29 customary international law that applies to all nations except those nonsignatories  
 30 who persistently object to it,"<sup>124</sup> and we have yet to see the repercussions of  
 31 this evolution. The concept of "cultural diversity," as interpreted beyond the  
 32 narrow trade versus culture context,<sup>125</sup> can also prove powerful enough to mobilize  
 33 broader and innovative tools in cultural policymaking at all levels of governance.<sup>126</sup>  
 34 Only time will show whether these expectations can be met.

## 37 END NOTES

39 1. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions,  
 40 adopted 20 October 2005, 45 I.L.M. 269 (hereinafter "UNESCO Convention on Cultural Diversity,"  
 41 "UNESCO Convention," or just "convention").

42 2. Australia, Honduras, Nicaragua, and Liberia abstained.

43 3. As of 30 October 2012, 125 countries had ratified the UNESCO Convention. See <http://portal.unesco.org/la/convention.asp?KO=31038&language=E> (accessed 16 January 2013).

- 1       4. Craufurd Smith, "The UNESCO Convention," 28–29.
- 2       5. See, e.g., UNESCO, Agreement on the Importation of Educational, Scientific and Cultural
- 3       Materials, Florence, 17 June 1950 (updated with the Nairobi Protocol, 26 November 1976); UNESCO,
- 4       Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague,
- 5       14 May 1954; UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import,
- 6       Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970. More recent acts
- 7       are the Council of Europe Declaration on Cultural Diversity, Strasbourg, 7 December 2000, and the
- 8       UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001.
- 9       6. See, e.g., UNESCO, Convention Concerning the Protection of the World Cultural and Natural
- 10      Heritage, Paris, 16 November 1972); UNESCO, Convention for the Safeguarding of the Intangible
- 11      Cultural Heritage, Paris, 17 October 2003; Council of Europe, European Landscape Convention,
- 12      European Treaty Series No 176, Florence, 20 October 2000.
- 13      7. Graber, "The New UNESCO Convention."
- 14      8. Articles 7–11 UNESCO Convention.
- 15      9. Articles 12–19 UNESCO Convention, excluding Article 16, which is of binding nature.
- 16      10. GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment,
- 17      Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause").
- 18      11. Article 16 UNESCO Convention. See Nurse, "Expert Report on Preferential Treatment."
- 19      12. See Article 6(2)(a)–(h) UNESCO Convention.
- 20      13. Article 6(2)(a) UNESCO Convention.
- 21      14. Article 6(2)(h) UNESCO Convention. For a taxonomy of cultural policy measures, see Footer
- 22      and Graber, "Trade Liberalisation and Cultural Policy," 122–26.
- 23      15. Article 4(1) defines "cultural diversity" as referring "to the manifold ways in which the cultures
- 24      of groups and societies find expression. These expressions are passed on within and among groups
- 25      and societies."
- 26      16. See U.S. Mission to UNESCO, "Explanation of Vote of the United States."
- 27      17. See Hahn, "A Clash of Cultures?"; Graber, "The New UNESCO Convention"; Craufurd Smith,
- 28      "The UNESCO Convention"; Burri, "Trade versus Culture in the Digital Environment."
- 29      18. See Operational Guidelines on Measures to Promote and Protect Cultural Expressions (Arti-
- 30      cles 7, 8, and 17 of the Convention), approved by the Conference of Parties at its second session (June
- 31      2009); Operational Guidelines on Information Sharing and Transparency (Article 9 of the Conven-
- 32      tion), approved by the Conference of Parties at its third session (June 2011); Operational Guidelines
- 33      on Education and Public Awareness (Article 10 of the Convention), approved by the Conference
- 34      of Parties at its third session (June 2011); Operational Guidelines Role and Participation of Civil
- 35      Society (Article 11 of the Convention), approved by the Conference of Parties at its second session
- 36      (June 2009); Operational Guidelines on Integration of Culture in Sustainable Development (Article
- 37      13 of the Convention), approved by the Conference of Parties at its second session (June 2009);
- 38      Operational Guidelines on Cooperation for Development (Article 14 of the Convention), approved
- 39      by the Conference of Parties at its second session (June 2009); Operational Guidelines for Partnerships
- 40      (Article 15 of the Convention), approved by the Conference of Parties at its second session (June 2009);
- 41      Operational Guidelines on Preferential Treatment for Developing Countries (Article 16 of the Conven-
- 42      tion), approved by the Conference of Parties at its second session (June 2009); Guidelines on the Use of
- 43      the Resources of the International Fund for Cultural Diversity (Article 18 of the Convention), approved
- 44      by the Conference of Parties at its second session (June 2009); Operational Guidelines on Exchange,
- 45      Analysis and Dissemination of Information (Article 19 of the Convention), approved by the
- 46      Conference of Parties at its third session (June 2011); Operational Guidelines on Measures to Ensure the
- 47      Visibility and Promotion of the Convention, approved by the Conference of Parties at its third session
- 48      (June 2011). All available at [http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/operational-guidelines)
- 49      of-cultural-expressions/the-convention/operational-guidelines (accessed 24 January 2013).
- 50      19. Article 2(2) UNESCO Convention.
- 51      20. Eide, "Cultural Rights as Individual Human Rights," 289–301; Stamatopoulou, *Cultural Rights*
- 52      *in International Law*.

- 1 21. Conversi, "Cultural Homogenization."
- 2 22. Articles 2(1), 2(3), and 7 UNESCO Convention.
- 3 23. Craufurd Smith, "The UNESCO Convention," 28, 37.
- 4 24. See e.g., Article 5 UNESCO Declaration.
- 5 25. Despite a few mentions in Recitals 8, 13, and 15 of the preamble, Articles 2(3) and 7(1)(a)  
UNESCO Convention. See Aylwin and Coombe, "Cultural Pluralism Protects Traditional Knowledge";  
6 Craufurd Smith, "The UNESCO Convention," 54.
- 7 26. Recital 17 of the UNESCO Convention's preamble.
- 8 27. See, e.g., Cohen, "Creativity and Culture"; Burri, "Cultural Protectionism 2.0."
- 9 28. On the notion of conflict, see Pauwelyn, *Conflict of Norms*, 5–11.
- 10 29. For all possible causes of conflict, see Dahrendorf, "Free Trade Meets Cultural Diversity."
- 11 30. Article 20(2) UNESCO Convention.
- 12 31. Article 20(1) UNESCO Convention.
- 13 32. See Graber, "The New UNESCO Convention," 565–68; Hahn, "A Clash of Cultures," 540–46;  
Stoll, "Article 20. Relationship to Other Treaties."
- 14 33. Shaffer and Pollack, "Hard vs. Soft Law," 772.
- 15 34. Shaffer and Pollack, "Hard vs. Soft Law," 771.
- 16 35. Craufurd Smith, "The UNESCO Convention," 53–54; Burri, "Trade and Culture in Interna-  
tional Law"; Burri, "Cultural Protectionism 2.0."
- 17 36. Craufurd Smith, "The UNESCO Convention," 30–32; also Pauwels et al., "Culture Incorporated."
- 18 37. Alter and Meunier talk of "international regime complexity" to signify the presence of nested,  
partially overlapping, and parallel international regimes that are not hierarchically ordered and stress  
19 that the lack of hierarchy is particularly typical of the international level. See Alter and Meunier, "The  
20 Politics of International Regime Complexity," 13. This follows up on important work on the notion  
of "regime complex." See Raustiala and Victor, "Regime Complex for Plant Genetic Resources."
- 21 38. Alter and Meunier, "The Politics of International Regime Complexity," 16.
- 22 39. Alter and Meunier, "The Politics of International Regime Complexity," 16.
- 23 40. We refer here to the process of "regime shifting." As Helfer observed "complexity enables  
24 a strategy of 'regime shifting' whereby states and nonstate actors relocate rulemaking processes to  
international venues whose mandates and priorities favour their concerns and interests." Regime  
25 shifting, Helfer argues, is different from "forum shopping," which involves a change of venue to achieve  
26 a single favorable decision. Regime shifting is in contrast a longer-term, iterative strategy that "seeks  
27 to create outcomes that have feedback effects in other venues." Helfer, "Regime Shifting in the  
28 International Intellectual Property System," 39; also Helfer, "Regime Shifting: The TRIPs Agreement."
- 29 41. Craufurd Smith, "The UNESCO Convention," 53–54.
- 30 42. See, e.g., Moran, "United States' Trade Policy"; Graber, "Audio-Visual Policy"; Bruner, "Culture,  
Sovereignty, and Hollywood."
- 31 43. For example, Brazil, Japan, and India have all ratified the Convention but remain equally  
32 willing to engage in further liberalization of the audiovisual sector. See Pauwels et al., "Culture  
33 Incorporated."
- 34 44. Supported by Germany, Greece, Mexico, Monaco, Morocco, and Senegal, and a number of  
Francophone UNESCO Member States.
- 35 45. See Acheson and Maule, "Convention on Cultural Diversity."
- 36 46. Burri, "Trade versus Culture: The Policy of Cultural Exception."
- 37 47. There are plenty of proposals that fall into this category. For an overview as well as references  
38 to the authors, see Burri, "Trade versus Culture in the Digital Environment," 46–53.
- 39 48. WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 2010.
- 40 49. See WTO, Communication from the European Communities and its Member States,  
Conditional Revised Offer, TN/S/O/EEC/Rev.1, 2005; WTO Council for Trade in Services, Audiovisual  
41 Services, Background Note by the Secretariat, S/C/W/310, 2010.
- 42 50. Graber, "Audio-visual Policy," 166–70; Roy, "Audiovisual Services in the Doha Round,"  
43 931–36.

- 1 51. See Wunsch-Vincent, "Trade Rules for the Digital Age," 501–505.
- 2 52. Burri and Cottier, *Trade Governance in the Digital Age*.
- 3 53. See, e.g., Cooney and Lang, "Taking Uncertainty Seriously."
- 4 54. See, e.g., Sacerdoti et al., *The WTO at Ten*.
- 5 55. Graber, "The New UNESCO Convention," 567, 571; Voon, "UNESCO and the WTO," 652.
- 6 56. WTO Appellate Body Report, "China—Measures Affecting Trading Rights and Distribution  
7 Services for Certain Publications and Audiovisual Entertainment Products (China—Publications and  
8 Audiovisual Products)," WT/DS363/AB/R, adopted 21 December 2009, confirming in most essential  
9 points WTO Panel Report, "China—Measures Affecting Trading Rights and Distribution Services for  
10 Certain Publications and Audiovisual Entertainment Products (China—Publications and Audiovisual  
11 Products)," WT/DS363/R, adopted 12 August 2009.
- 12 57. China ratified the UNESCO Convention on 30 January 2007.
- 13 58. WTO Appellate Body Report, "China—Publications and Audiovisual Products," para. 4.207,  
14 referring to Article 20 UNESCO Convention.
- 15 59. WTO Appellate Body Report, "China—Publications and Audiovisual Products."
- 16 60. WTO Appellate Body Report, "China—Publications and Audiovisual Products," para. 25, referring  
17 to China's appellant's submission, para. 12.
- 18 61. Following the meaning of the term in Article XIV(a) GATS as broadly interpreted in  
19 "US—Gambling." See WTO Panel Report, "United States—Measures Affecting the Cross-Border Supply  
20 of Gambling and Betting Services (US—Gambling)," WT/S285/R, adopted 10 November 2004, paras.  
21 6.461 and 6.465. See also Delimatsis, "The Puzzling Interaction of Trade and Public Morals."
- 22 62. WTO Panel Report, "China—Publications and Audiovisual Products," para. 7.751.
- 23 63. WTO Panel Report, "China—Publications and Audiovisual Products," para. 7.913.
- 24 64. See Wunsch-Vincent, "The Digital Trade Agenda," 7–46.
- 25 65. The DR-CAFTA includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the  
26 Dominican Republic.
- 27 66. See Wunsch-Vincent "The Digital Trade Agenda," 28–35 and "Trade Rules for the Digital  
28 Age," 516–23; Wunsch-Vincent and Hold, "Towards Coherent Rules for Digital Trade."
- 29 67. Voon, "A New Approach to Audio-Visual Products," 25–26.
- 30 68. Bernier, "The Recent Free Trade Agreements," 15. Australia, as the most affluent of these states,  
31 managed to preserve existing quotas for commercial television and commercial radio. Singapore and  
32 Chile were also able to include relatively significant reservations, as did Costa Rica, the Dominican  
33 Republic, and Morocco. Conversely, Guatemala, Honduras, El Salvador, and Nicaragua left their  
34 audiovisual sectors in practice open to imports. Bernier, "The Recent Free Trade Agreements," 11–12.
- 35 69. Shaffer and Pollack, "Hard vs. Soft Law," 773.
- 36 70. Shaffer and Pollack, "Hard vs. Soft Law," 773.
- 37 71. See Article 25 UNESCO Convention, as well as the Annex on Conciliation Procedure.
- 38 72. Article 23(6)(c) UNESCO Convention.
- 39 73. Article 9(a) UNESCO Convention; Craufurd Smith, "The UNESCO Convention," 39.
- 40 74. On reputational costs, see, e.g., Guzman, "Reputation and International Law" and "How In-  
41 ternational Law Works"; Brewster, "Reputation in International Relations."
- 42 75. This has been admitted by the Intergovernmental Committee, which expressly states that: "At the  
43 heart of the Convention is the pursuit of international cooperation to promote culture as a driver for  
development recognising that the cultural aspects of development are equally important as its economic  
components. Parties of the Convention are called upon to incorporate culture as a strategic element in  
their international cooperation frameworks, taking into account the UN Millennium Declaration as  
well as in their national sustainable development policies and programmes." Intergovernmental Com-  
mittee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 22.
76. Rezk, "Negotiating Diversity," 250; also European Parliament, "The Implementation of the  
UNESCO Convention," 20.
77. Reports have been submitted by Albania, Argentina, Austria, Bolivia, Brazil, Bulgaria, Canada,  
Chile, Cuba, Cyprus, Denmark, Ecuador, Estonia, the EU, Finland, France, Germany, Greece, Guinea,

1 Hungary, Ireland, Italy, Jordan, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Mongolia,  
 2 Montenegro, Namibia, New Zealand, Nigeria, Norway, Oman, Paraguay, Peru, Poland, Portugal,  
 3 Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, and Uruguay. All reports are available  
 4 at <http://www.unesco.org/culture/cultural-diversity/2005convention/en/programme/periodicreport>  
 (accessed 24 January 2013).

5 78. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1,  
 6 para. 30.

7 79. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1,  
 8 paras. 24–25.

9 80. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1,  
 10 paras. 2, 45–48.

11 81. See Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," as  
 12 well as the individual country reports.

13 82. By the end of 2012, US\$5,796,373 had been collected in the Fund. The IFCD is unique in that  
 14 the majority of its funds go toward supporting NGOs working locally in the field of cultural policy.  
 15 In 2012, the Intergovernmental Committee approved 13 projects to be implemented in 12 devel-  
 16 oping countries at a cost of more than US\$1 million. Projects cover a wide range of activities—from  
 17 capacity building and cultural mapping to policy analysis and development, as well as entrepreneurship  
 18 support and cultural industries consolidation. See [http://www.unesco.org/new/en/culture/themes/](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/international-fund)  
[cultural-diversity/diversity-of-cultural-expressions/international-fund](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/international-fund) (accessed 24 January 2013).

19 83. Singh, "Culture or Commerce?" 42.

20 84. See, e.g., Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary"  
 21 and German Commission for UNESCO and Asia-Europe Foundation, "Mapping Cultural Diversity."

22 85. See <http://www.eunic-brussels.eu> (accessed 29 January 2013).

23 86. The Global Alliance for Cultural Diversity fosters partnerships between public, private, and  
 24 civil society actors in cultural industries in developing countries. It is a project of the Convention and  
 25 operates at two levels: by providing information on the partnerships through a web platform and by  
 26 supporting certain projects. See [http://www.unesco.org/new/en/culture/themes/cultural-diversity/](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/global-alliance-for-cultural-diversity)  
[diversity-of-cultural-expressions/programmes/global-alliance-for-cultural-diversity](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/global-alliance-for-cultural-diversity) (accessed 29  
 27 January 2013).

28 87. Pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU), EU  
 29 trade policy is an exclusive EU competence for all sectors, without any sectorial carve-outs, shared  
 30 competences or mixed agreements. Pre-Lisbon, there had been a carve-out for cultural and audiovi-  
 31 sual services (Article 133(6) of the Treaty Establishing the European Union). Any agreement, which  
 32 included provisions regarding cultural and audiovisual services, would so fall within the shared com-  
 33 petence of the EU and the Member States and such mixed agreements had to be concluded together  
 34 by the EU and the Member States. See, e.g., Krajewski, "External Trade Law," 95–97.

35 88. See European Commission, "Global Europe."

36 89. European Commission, "Quadrennial Periodic Report," 24.

37 90. The CARIFORUM has 16 participating states: Antigua and Barbuda, the Bahamas, Barba-  
 38 dos, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Suriname,  
 39 Saint Lucia, St. Christopher and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and  
 40 Tobago.

41 91. Such changes aimed to (1) condition entry into force of the Protocol only upon ratification by  
 42 Korea; (2) set coproduction criteria, which allow qualifying for the respective "broadcasting quotas";  
 43 and (3) ensure a full institutional separation for the Protocol from the general dispute settlement  
 mechanisms of the Agreement's Trade Committee. The EU–Korea Protocol is based on stricter reci-  
 procity and balance than the EU–CARIFORUM Protocol, which is asymmetrical in nature.

92. Albeit, not in a strictly protocol form: While the agreements on cultural cooperation were  
 still negotiated simultaneously with the trade agreements, they are not annexed to them. As no pref-  
 erential treatment of coproductions is envisaged, the agreements are disconnected from the trade  
 agreement altogether. In the case of Peru and Colombia, not a protocol but a stand-alone agreement



on cultural cooperation has been adopted; for Central America, the cultural cooperation provisions are attached to the provisions for cooperation on cultural and audiovisual matters under the umbrella Association Agreement.

93. European Commission, “Quadrennial Periodic Report,” 24. Standard in the Protocol’s template are some horizontal and sectoral provisions. The former cover issues that are intended to promote cooperation in all cultural fields taking into account the particular (dual) character of cultural goods and services, such as exchange of best practices, increase of contacts and facilitation of training opportunities, as well as the temporary entry for cultural practitioners. Sectoral provisions address the particularities of some specific sectors, such as audiovisual cooperation and coproductions, as well as cooperation in relation to publications, performing arts, and protection of heritage sites.

94. Sauvé and Ward, “The EC–CARIFORUM,” 53–54.

95. Sauvé and Ward, “The EC–CARIFORUM,” 58.

96. See Cottier and Molinuevo, “Article V.”

97. Article 1(n) of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95/1, 15 April 2010 (hereinafter “AVMSD”).

98. Article 16 AVMSD (previously Article 4 TVWFD) that Member States shall ensure that broadcasters allocate the majority of airtime on TV channels to European-made programs (the so-called European works).

99. Troussard et al., “Article 16,” 449–50.

100. For an overview of the various strands of critique, see Loisen and De Ville, “The EU–Korea Protocol,” 260–65.

101. Loisen and De Ville “The EU–Korea Protocol,” 255; also Loisen et al., “Mainstreaming EU Cultural Policies,” 79.

102. See, e.g., Loisen and De Ville, “The EU–Korea Protocol,” 266–67; also more generally, Burri, “Trade and Culture in International Law.”

103. On the definition and critique of the concept of “European work,” see Burri, “The Reform of the EC Audiovisual Media Regulation.”

104. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 10.

105. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 15.

106. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 16.

107. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 17.

108. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 19.

109. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 99.

110. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 100.

111. See comprehensively Psychogiopoulou, *The Integration of Cultural Considerations*; Craufurd Smith, “The Evolution of Cultural Policy in the EU.”

112. European Commission, “Inventory of Community Actions,” 7–24.

113. On the application of Article 167(4) TFEU, see Craufurd Smith, “Community Intervention in the Cultural Field,” 64; Holmes, “European Community Law and the Cultural Aspects of Television”; Psychogiopoulou, “The Cultural Mainstreaming Clause.”

114. Burri, “Business as Usual?”

115. Coming to the same conclusion, see Attentional et al., “Study on the Implementation,” 200.

116. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 85.

117. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 85. See also European Commission, "Report on Measures," 3; European Commission, "Quadrennial Periodic Report."

118. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 85, referring to Austria's quadrennial periodic report, 19.

119. As noted earlier, most of the achievements were of institutional nature. Parties reported about having established national institutes to promote specific cultural industries, created departments or institutes of the Ministry of Culture to promote cultural expressions of minorities or, in some cases, established for the first time a separate Ministry of Culture (e.g., in Bolivia and Ecuador). More fundamentally, for example, in Tunisia, it led for the first time to the recognition of the State's sovereign right to develop and implement cultural policies. For more examples, see Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 87.

120. Raustiala and Victor, "Conclusions," 684–86; Raustiala and Slaughter, "International Law, International Relations, and Compliance," 538; Raustiala, "Compliance and Effectiveness."

121. Raustiala, "Compliance and Effectiveness," 398.

122. European Parliament, "The Implementation of the UNESCO Convention in the EU's External Policies," 21.

123. European Parliament, "The Implementation of the UNESCO Convention in the EU's External Policies," 11. Article 13 UNESCO Convention stipulates that, "Parties shall endeavour to integrate culture in their national development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions."

124. Shaffer and Pollack, "Hard vs. Soft Law," 772.

125. Burri, "Cultural Diversity as a Concept of Global Law."

126. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 9; also Pager, "Beyond Culture vs. Commerce" and Burri, "Cultural Protectionism 2.0."

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